Supreme Court, U.S.
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No. 96-1748

In the Supreme Court of the United States

OCTOBER TERM, 1996

HAROLD D. JOHNSON, M.D.,
PETITIONER,

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL
CORPORATION, *et al.*,
RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

1. Respondents erroneously assert (Br. in Opp. 3) that the question presented in this case was not raised below. As we detail in the petition, Dr. Johnson filed volumes of evidence opposing the hospital's motion for summary determination of its right to immunity under the HCQIA that he asked the lower courts to consider. *See* Pet. 6-10. Because the lower courts' unexplained refusal to review that evidence conflicts with the precedent of this Court on the role of a court in evaluating the evidence before it under Rule 301, FED. R. EVID., and grants hospitals the right to absolute immunity under the HCQIA, the question presented has substantial, recurring, importance.

Unaware that the district court would not even review the evidence he filed to rebut the statutory presumption of reasonable action, Dr. Johnson, admittedly did not cite Rule 301 in that court. Rather, Dr. Johnson filed 114 exhibits with the district court in opposition to the hospital's 1993-motion for summary judgment on grounds of immunity under the HCQIA. Dr. Johnson argued that his evidence was sufficient to overcome the presumption of reasonable hospital action so as to preclude the grant of summary judgment to the hospital. *Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment on Grounds of Immunity Under the Health Care Quality Improvement Act* at 40-54.

On appeal, Dr. Johnson stated the issue as the district court's failure to review his evidence and noted that the appellate standard of review for a grant of summary judgment is *de novo*. Dr. Johnson argued that the job of the district court, at the summary judgment stage, was to consider his evidence and determine from it whether a jury could conclude that the hospital was not entitled to immunity under the HCQIA. *Supplemental Memorandum in Support of Appellant's Motion for Expedited Consideration of Appeal and for Summary Reversal* at 10-17; *Memorandum in Opposition to Appellee's Cross-Motion for*

Summary Affirmance and in Further Support of Appellant's Motion for Summary Reversal at 5-6.

Following its summary affirmance of the grant of summary judgment, Dr. Johnson asked the court of appeals to determine, *in banc*, whether a federal court is

> obligated to review all of the testimonial and documentary evidence submitted by the parties, against their relative burdens of proof, before summarily determining that a hospital is . . . entitled to immunity from damages under the Health Care Quality Improvement Act,

pursuant to the *de novo* standard of review. *Petition for Rehearing and Suggestion for Rehearing In Banc* at 1, 3. For purposes of review by this Court, the issue now before it was both pressed by Dr. Johnson and passed upon by the court of appeals in its order summarily affirming the grant of summary judgment "substantially for the reasons stated by the district court." App. 1a. Review of the question presented here is appropriate. *See, e.g., United States v. Williams*, 504 U.S. 36, 40-43 (1992) (holding that even review of an issue not pressed by the petitioner below is permitted so long as it has been passed upon).

2. The petition also should be granted because, as we discuss in the petition, the decision below conflicts with the well-established role of a court in deciding a motion for summary judgment. We illustrate in the petition (Pet. 6-11) the volume of evidence the lower courts ignored in this case. As it must, the hospital here concedes (Br. in Opp. 2, n. 2) that "[t]here were significant issues regarding the quality of patient care which were in dispute." The decision below thus is in direct conflict with the Tenth Circuit's holding -- recently left standing by this Court -- that expert testimony on behalf of a physician who alleges misuse of the hospital peer review process creates a

triable issue of fact on the reasonableness of a hospital's action. *Brown v. Presbyterian Healthcare Serv.*, 101 F.3d 1324, 1333 (10th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3689 (Apr. 15, 1997).

Moreover, this Court recently held that not even a sitting President of the United States is entitled to absolute immunity from suit where a private party seeks damages arising from his unofficial actions. *Clinton v. Jones*, 1997 U.S. LEXIS 3254 (May 27, 1997). This Court also has rejected claims that physician peer reviewers are entitled to state-action immunity in antitrust proceedings. *Patrick v. Burget*, 486 U.S. 94 (1988). Likewise, this Court has let stand decisions of the Sixth and Ninth Circuits directly holding that the HCQIA establishes only a qualified right to immunity from damages, not an absolute right to immunity from suit. *Decker v. IHC Hosps., Inc.*, 982 F.2d 433 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 3041 (1993); *Manion v. Lima Mem. Hosp.*, 986 F.2d 1036 (6th Cir. 1992), *cert. denied*, 114 S. Ct. 71 (1993). Thus, no court has granted any private litigant the type of absolute immunity afforded the respondents in this case.

3. Respondents also claim that the petition should be denied because they are entitled to prevail on other, unspecified, grounds since Dr. Johnson allegedly failed to respond to their additional dispositive motions (Br. in Opp. 3-4). Presumably, the hospital means that it is entitled to summary judgment on the substantive antitrust claims as well.[1] That claim is unfounded for, as we note in the petition (Pet. 21), a grant of summary judgment is appropriate only after adequate discovery has been had by the non-moving party. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Since the district court repeatedly refused to grant Dr. Johnson's motions to compel discovery prior

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[1] The question of immunity under the HCQIA is relevant only to the issue of substantive antitrust liability.

to holding that he had conceded the hospital's 1993-dispositive motion on the issue of antitrust liability (App. 87a, 90a-91a, 96a), and Dr. Johnson had opposed its 1990-dispositive motion on the same issue in November 1990,[2] the district court's alternative holding is at once premature and incompatible with its established task at the summary judgment stage.

The district court also abused its discretion when it ignored Dr. Johnson's June 1995-request for an enlargement of time in which to respond further to the substantive antitrust claims -- in light of its refusal to permit discovery -- contemporaneously with the June 1996-decision of default. *See* App. 26a-27a. That abuse of discretion is made all the more clear by the district court's later denial of the hospital's request for attorney's fees noting that Dr. Johnson had "vigorously prosecuted this case." App. 84a. Dr. Johnson obviously could not have prosecuted vigorously a case in which he also defaulted. The alternative holding of the district court is no basis upon which to deny review of the important question presented in this case.

CONCLUSION

For the reasons stated above, and in the petition, the

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[2] *See* Pet. 10 and n. 23.

petition for a writ of certiorari should be granted.

Respectfully submitted.

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